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A Few Words of Caution as the Supreme Court Considers *Fry v. Napoleon Community Schools*

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United States Court of Appeals for the Eleventh Circuit

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A Few Words of Caution as the Supreme Court Considers *Fry v. Napoleon Community Schools*

Kevin Golembiewski*

Abstract

This term, the Supreme Court will consider Fry v. Napoleon Community Schools. Fry implicates a circuit split on the proper scope of the exhaustion requirement in 20 U.S.C. § 1415(l) of the Individuals with Disabilities Education Act (IDEA). That section requires parents of students with disabilities to exhaust state administrative remedies “before the filing of a civil action . . . seeking relief that is also available under” the IDEA. Two different approaches to this requirement have emerged among the courts of appeals: an “injury-centered” approach and a “relief-centered” approach. Under the injury-centered approach, exhaustion is required when a child’s injuries are education-related. In contrast, the relief-centered approach demands exhaustion only if a parent seeks a form of relief that can be obtained under the IDEA. If the Supreme Court adopts the injury-centered approach in Fry, it should be cautious in its application of the approach. The Court’s application of the injury-centered approach could have important, unforeseen consequences for students with disabilities. The approach requires courts to consider what “educational” means under the IDEA—an analysis that bears on the scope of the IDEA’s substantive protections. And the Court has yet to provide guidance as to the definition of “educational.” Therefore, the Court’s application of the approach in Fry could have a significant impact on students’ access to special education services.

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I. Introduction

The Individuals with Disabilities Education Act (IDEA) is the flagship civil rights legislation for students with disabilities. Under the IDEA, school districts must ensure that students with disabilities receive a “free and appropriate public education” (FAPE).¹ When a parent believes her child is being denied a FAPE, she can sue her child’s school district for injunctive relief, as well as certain types of compensatory relief.² However, § 1415(l) of the IDEA requires parents to exhaust state administrative remedies prior to pursuing “a civil action . . . seeking relief that is . . . available under” the IDEA.³ Federal courts of appeals disagree on the proper scope of this provision. This term, in *Fry v. Napoleon Community Schools*,⁴ the Supreme Court will address that split.

Two different approaches to the IDEA’s exhaustion requirement have emerged among the courts of appeals: an “injury-centered” approach and a “relief-centered” approach.⁵

1. 20 U.S.C. § 1400(c)(3) (2016). The Supreme Court is currently considering the proper standard for a FAPE. See *Endrew F. v. Douglas Cty. Sch. Dist.*, 798 F.3d 1329 (10th Cir. 2015), *cert. granted*, No. 15-827 (U.S.S.C. September 29, 2016). Some courts have found that a FAPE requires school districts to provide students an opportunity to make meaningful educational progress, while other courts have concluded that a FAPE requires only an opportunity to obtain some educational benefit. See *id.* at 1338–39 (summarizing different circuit courts’ approach to the FAPE standard).

2. 20 U.S.C. § 1415(i)(2)(A).

3. 20 U.S.C. § 1415(l).

4. 788 F.3d 622 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016).

5. See *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 873–74 (9th Cir. 2011) (en banc) (discussing the injury-centered/relief-centered circuit split); *Petition*

Under the injury-centered approach, exhaustion is required when a student's injuries are educational in nature. In other words, when an alleged injury relates to a student's right to a FAPE, exhaustion is required.⁶ Unlike the injury-centered approach, the relief-centered approach demands exhaustion only if a parent seeks some form of relief that can be obtained under the IDEA.⁷ Most courts of appeals, including the U.S. Court of Appeals for the Sixth Circuit in *Fry*, have adopted the injury-centered approach. But the U.S. Courts of Appeals for the Eighth and Ninth Circuits have embraced the relief-centered approach.

If the Supreme Court adopts the injury-centered approach in *Fry*, it should be cautious in its application of the approach. In determining whether a parent's claims are educational in nature, courts must consider, as a threshold matter, what "educational" means under the IDEA. That analysis has consequences for IDEA issues well beyond exhaustion. How courts interpret "educational" is crucial to FAPE claims—IDEA eligibility and the scope of the IDEA's protections turn on a student's *educational* progress and needs. Yet, the exact definition of "educational" is unsettled among courts. Indeed, the Supreme Court has yet to provide guidance to lower courts as to that definition. The Court's application of the injury-centered approach in *Fry* could therefore heavily shape courts' interpretation of "educational" and significantly impact students' access to special education services moving forward.

II. The Exhaustion Requirement

Section 1415(*l*) was passed as part of the Handicapped Children's Protection Act of 1986—an amendment to the IDEA. The section states:

for Writ of Certiorari at 9–12, *Fry v. Napoleon Cmty. Sch.*, No. 15-497 (U.S.S.C. June 28, 2016) (same).

6. *Fry*, 788 F.3d at 627 (citing *F.H. ex rel. Hall v. Memphis City Sch.*, 764 F.3d 638, 644 (6th Cir. 2014)).

7. See *Payne*, 653 F.3d at 871 ("Non-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA.").

Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [(ADA)], . . . the Rehabilitation Act of 1973 [(Section 504)] . . . or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [state administrative] procedures [set forth in the IDEA] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].⁸

Congress passed this section in response to *Smith v. Robinson*.⁹ In *Smith*, the Supreme Court held that the IDEA is the “exclusive avenue” through which a parent can pursue anti-discrimination relief on behalf of a student with a disability.¹⁰ Section 1415(l) overturned *Smith*’s holding and opened the door to parents pursuing other types of federal anti-discrimination claims, subject to certain exhaustion constraints.¹¹

Since its enactment in 1986, § 1415(l)’s exhaustion requirement has been the subject of frequent litigation.¹² Parents generally favor a less stringent exhaustion requirement, allowing them greater flexibility in their efforts to vindicate their children’s rights. In contrast, school districts are inclined towards a robust exhaustion requirement. At the outset of a student discrimination lawsuit, school districts have an information advantage because student discrimination claims arise in the

8. 20 U.S.C. § 1415(l) (2016).

9. 468 U.S. 992 (1984). See S. REP. NO. 99-112, at 2 (1985) (stating that Congress intended § 1415(l) to abrogate *Smith*’s holding that the IDEA preempts other laws protecting students with disabilities); H.R. REP. NO. 99-296, at 4, 15 (1985) (same).

10. See *Smith*, 468 U.S. at 1012–13 (“We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.”).

11. 20 U.S.C. § 1415(l).

12. See Peter J. Maher, *Caution on Exhaustion: The Courts’ Misinterpretation of the IDEA’s Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA*, 44 CONN. L. REV. 259, 281–92 (2011) (summarizing a number of federal cases where exhaustion was at issue).

school setting. State administrative proceedings allow school districts to maintain that advantage, as those proceedings have limited discovery requirements. Federal courts impose robust discovery requirements that are more effective in mitigating information asymmetry.

Often, exhaustion issues arise when a parent brings an ADA and/or a Section 504 civil action against her child's school district.¹³ The purpose of the IDEA's exhaustion requirement is to provide states an opportunity to quickly address a denial of a FAPE since states are "best equipped to craft [an appropriate educational program] or remedial substitutes."¹⁴ And the exact same school district failures that give rise to a FAPE violation under the IDEA can trigger an ADA and/or a Section 504 claim. In fact, the IDEA, ADA, and Section 504 each compel school districts to afford students with disabilities a FAPE,¹⁵ resulting in some ADA and Section 504 claims being fully subsumed by the IDEA.¹⁶ As a result, ADA and Section 504 claims can implicate the types of educational-programming issues that the IDEA's exhaustion requirement seeks to funnel through state administrative proceedings.

In considering the reach of the exhaustion requirement, the U.S. Courts of Appeals for the First, Second, Third, Sixth,

13. Rehabilitation Act of 1973, 29 U.S.C. § 794 (2011).

14. See *Long v. Dawson Springs Indep. Sch. Dist.*, 197 F. App'x 427, 433–34 (6th Cir. 2006) (citing *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 297 (1982)).

15. See 34 C.F.R. § 104.33(a) (2016) ("A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."); see also 28 C.F.R. § 35.103(a) (2016). *But see* Mark Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. ON C.L. & C.R. 1, 11–14 (2010) (exploring Section 504's FAPE standard and concluding that it may diverge from the IDEA's FAPE standard).

16. Notably, however, the ADA and Section 504 also provide students with disabilities a type of protection that is distinct from the IDEA. Both require school districts to ensure that students with disabilities receive *equal* access to school facilities and services. This is the same type of general anti-discrimination protection that the ADA and Section 504 afford other groups of persons with disabilities. Such "equal access" protections differ from the IDEA's guarantee of a FAPE, which only ensures students with disabilities the opportunity to receive *educational benefit*. See *Gabel ex rel. L.G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313, 333–34 (S.D.N.Y. 2005).

Seventh, Tenth, and Eleventh Circuits have adopted the injury-centered approach.¹⁷ In *Charlie F. v. Board of Education of Skokie School District*,¹⁸ the Seventh Circuit set forth the framework for the injury-centered approach. Each of the other courts of appeals adopting the approach has relied in part on *Charlie F.*

The *Charlie F.* court's analysis of § 1415(l) focused on the phrase, "relief that is also available [under the IDEA]."¹⁹ Based on this language, the court concluded that whenever the "nature of [a parent's] claim" is such that the injury alleged could in theory be remedied by the IDEA, relief is "available" under the IDEA and the parent must therefore exhaust the claim.²⁰ According to the court, this occurs whenever the "genesis and manifestations of the [alleged] problem are educational."²¹ Thus, the injury-related approach turns on whether a parent's claim is educational in nature.

Departing from the First, Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits, the Eighth and Ninth Circuits have embraced the relief-centered approach.²² In *Payne v. Peninsula School District*, the Ninth Circuit, sitting en banc, "reject[ed] the injury-centered approach . . . and h[e]ld that a relief-centered approach more aptly reflects the meaning of the

17. For cases in which these courts have adopted the injury-centered approach, see *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 61–63 (1st Cir. 2002); *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 246–47 (2d Cir. 2008); *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 276–78 (3d Cir. 2014); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 991–92 (7th Cir. 1996); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1063–68 (10th Cir. 2002); *Babicz v. Sch. Bd. of Broward Cty.*, 135 F.3d 1420, 1422 & n.10 (11th Cir. 1998), *cert. denied*, 525 U.S. 816 (1998).

18. 98 F.3d 989 (7th Cir. 1996).

19. *Id.* at 991–92.

20. *Id.*

21. *Id.*

22. See *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 871 (9th Cir. 2011) (en banc) ("Non-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA."); *Moore v. Kansas City Pub. Sch.*, 828 F.3d 687, 693 (8th Cir. 2016) (adopting the Ninth Circuit's approach to exhaustion).

IDEA's exhaustion requirement."²³ Thereafter, the Eighth Circuit agreed with the Ninth Circuit's *Payne* decision.²⁴

The *Payne* court held that "[t]he IDEA's exhaustion requirement applies to claims only to the extent that the relief actually sought by the plaintiff could have been provided by the IDEA."²⁵ Explaining its rationale, the court stated:

[Section 1415(l)] specifies that exhaustion is required "before the filing of a civil action . . . seeking *relief* that is also available under [the IDEA]." 20 U.S.C. § 1415(l). This suggests that whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA. In other words, when determining whether the IDEA requires a plaintiff to exhaust, courts should start by looking at a complaint's prayer for relief and determine whether the relief sought is also available under the IDEA. If it is not, then it is likely that § 1415(l) does not require exhaustion in that case.²⁶

The relief-centered and injury-centered approaches most often diverge when a parent brings ADA or Section 504 claims seeking money damages. While the ADA and Section 504 provide for money damages, the IDEA does not.²⁷ Therefore, under the relief-centered approach, exhaustion is never required when a parent seeks solely money damages. The injury-centered approach, however, requires a parent requesting money damages to exhaust state administrative remedies if her claim is educational in nature.

In *Fry*—a case involving claims for money damages—the Supreme Court will address this injury-centered/relief-centered circuit split.

23. *Payne*, 653 F.3d at 874.

24. *Moore*, 828 F.3d at 693.

25. *Payne*, 653 F.3d at 874.

26. *Id.* at 875.

27. See *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 124–25 (1st Cir. 2003) ("We conclude that tort-like money damages, as opposed to compensatory equitable relief, are not available under [the] IDEA."); *id.* (noting that the Supreme Court in *Burlington Sch. Comm. v. Mass. Dept. of Educ.*, 471 U.S. 359 (1985) indicated that money damages are not available for IDEA violations).

III. Fry v. Napoleon Community Schools

In 2012, Stacy and Brent Fry filed a complaint in the District Court for the Eastern District of Michigan on behalf of their daughter, E.F., against E.F.'s school district, Napoleon Community Schools (Napoleon). In their complaint, the Frys allege that Napoleon violated the ADA and Section 504 by refusing to permit E.F. to attend school with her service dog. E.F. was born with cerebral palsy and, as a result, has limited motor skills and mobility.²⁸ She is an IDEA-eligible, special education student. E.F.'s service dog, Wonder, assists her with mobility and daily activities, such as retrieving dropped items, opening and closing doors, and taking her coat off.²⁹ The Frys allege that Napoleon's refusal to accommodate E.F. by allowing Wonder to attend school with her denied her, *inter alia*, equal access to school facilities, the use of Wonder as a service dog, the ability to form a bond with Wonder, and the opportunity to interact with other students at school.³⁰ The Frys also assert that Napoleon's actions caused E.F. psychological harm.³¹ As relief, the Frys seek only money damages and attorney's fees.³² They did not pursue state administrative remedies prior to filing their complaint in district court.

Napoleon filed a motion with the district court for judgment on the pleadings, raising the affirmative defense of exhaustion. In considering the motion, the district court relied on a Second Circuit decision—*Cave v. East Meadow Union Free School District*³³—and concluded that “the theory behind [a parent's] grievance may activate the IDEA's process, even if the [parent] wants a form of relief that the IDEA does not supply.”³⁴ Hence,

28. Fry v. Napoleon Cmty. Sch., 788 F.3d 622, 623–24 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016).

29. *Id.* at 624.

30. *Id.*

31. *Id.*

32. The Frys also included a catchall request for “other relief [that the court] deems appropriate.” See Napoleon Community Schools Response to Petition for Certiorari at App. 21, Fry v. Napoleon Cmty. Sch., No. 15-497 (U.S.S.C. June 28, 2016).

33. 514 F.3d 240 (2d Cir. 2008).

34. EF *ex rel.* Fry v. Napoleon Cmty. Sch., No. 12-15507, 2014 WL 106624, at *4 (E.D. Mich. Jan. 10, 2014), *aff'd sub nom.* Fry v. Napoleon Cmty. Sch., 788

the district court applied the injury centered-approach. The Frys argued to the district court that, even under that approach, they were not required to exhaust state administrative procedures prior to filing their complaint because they believe that E.F. received a FAPE. That is to say, the Frys asserted that they are not challenging the adequacy of E.F.'s educational program; they are only claiming that Napoleon denied E.F. *equal access* to its facilities and services by refusing to allow Wonder to attend school with her. The district court found this position unavailing, determining that the Frys' claims "at least partially . . . implicate issues relating to EF's" education.³⁵ For example, Napoleon would have to amend E.F.'s Individualized Education Program (IEP) to accommodate Wonder's presence during certain parts of the school day.³⁶ The district court therefore held that the Frys were required to exhaust their claims.³⁷

A divided Sixth Circuit panel affirmed the decision of the district court. Like the district court, the panel applied the injury-centered approach, holding that exhaustion is required "when both the genesis and the manifestations of [an alleged] problem [are] educational."³⁸ As such, the panel focused its analysis on whether the Frys' complaint implicates educational issues—a task that required the court to consider the meaning of "educational" under the IDEA.

Applying the injury-centered approach to the Frys' claims, the panel determined that "[t]he primary harms of not permitting Wonder to attend school with E.F.—inhibiting the development of E.F.'s bond with the dog and, perhaps, hurting her confidence and social experience at school—fall" under the IDEA's definition of "educational."³⁹ According to the panel, "[d]eveloping a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal" because "[e]ducational" needs encompass a student's "academic, developmental, and

F.3d 622 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016).

35. *Id.* at *5.

36. *Id.*

37. *Id.*

38. *Fry v. Napoleon Cmty. Sch.* 788 F.3d 622, 627 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016).

39. *Id.* at 628.

functional needs.”⁴⁰ The panel explained that, under the IDEA, “IEP[s] should include” service dog assistance and other interventions that “a student actually needs to learn in order to function effectively.”⁴¹ In addition, the panel found that, “[t]o the extent that the Frys . . . allege that Wonder would have provided specific psychological and social assistance to E.F. at school, the value of this assistance is also crucially linked to E.F.’s education”; “[a]ccommodations that help make a student feel more comfortable and confident at school should be included in an IEP.”⁴² Based on these findings, the panel concluded that “the specific injuries the Frys allege are essentially educational” and “the IDEA’s exhaustion requirement applies to the Frys’ claims.”⁴³

Judge Daughtrey dissented from the panel decision in *Fry*. She did not challenge the *Fry* majority’s use of the injury-centered approach. Instead, she claimed that the injuries alleged by the Frys are unrelated to the IDEA’s substantive protections because they are “noneducational in nature.”⁴⁴ In addressing the nature of the Frys’ claims, Judge Daughtrey construed “educational” more narrowly than the majority.⁴⁵ According to Judge Daughtrey, the Frys’ goal in having Wonder attend school with E.F. was to “develop more independent motor skills, which is not the function of an academic program”—“basic mobility is not a subject taught in elementary school.”⁴⁶ Rather than improve E.F.’s educational programming, the Frys sought to have E.F. and Wonder “become closely attached to one another in order to make the dog a valuable [mobility] resource for the child, especially during non-school hours.”⁴⁷ Moreover, Wonder’s

40. *Id.* at 628 (emphasis added).

41. *Id.* at 628.

42. *Id.* at 629.

43. *Id.* at 623.

44. *Id.* at 631 (Daughtrey, J., dissenting).

45. In fact, Judge Daughtrey specifically criticized the majority’s broad interpretation of “educational,” stating that, § 1415(*l*)’s carve-out for Section 504 and ADA claims “would have no meaning if any and every aspect of a child’s development could be said to be ‘educational’ and, therefore, related to a FAPE.” *Id.* at 635.

46. *Id.* at 632.

47. *Id.*

in-school role was purely related to E.F.'s ability to physically access the school facility—much like a wheelchair.⁴⁸ Hence, like the majority, Judge Daughtrey viewed Wonder as assisting E.F. with becoming more independent; however, Judge Daughtrey concluded that such assistance was not educational because it was mobility-related, not academic-related.⁴⁹

IV. The Injury-Centered Approach: Proceed with Caution

When the Supreme Court hears *Fry* this term, it should be cautious in considering the injury-centered approach. As illustrated by the Sixth Circuit's decision in *Fry*, the approach requires courts to opine on the IDEA's definition of "educational." If the Court conducts that analysis in *Fry*, its decision could have significant consequences for IDEA issues well beyond exhaustion. How courts interpret "educational" determines the scope of the IDEA's protections. Yet, the exact definition of "educational" is unsettled among circuit courts, and the Supreme Court has provided limited guidance on the issue. Therefore, a decision by the Court that delves into the definition of "educational" could heavily influence lower courts' approach to FAPE claims and students' access to special education services.

"Courts' interpretation of the term 'educational' is critical to students with . . . disabilities accessing IDEA services."⁵⁰ How broadly courts interpret "educational" dictates IDEA eligibility and the scope of school districts' obligations to IDEA-eligible students.⁵¹ Students are eligible for IDEA services if they have a disability that "adversely affects [their] *educational* performance."⁵² Additionally, the IDEA's substantive protections

48. *Id.* at 633–34.

49. *Id.* at 634 ("[T]he Fry's complaint does not tie use of the service dog to [E.F.]'s academic program or seek to modify her IEP in any way."); *id.* (stating that, in contrast to a human aide Napoleon provided to E.F., Wonder's role was to "help [E.F.] develop and maintain balance and mobility, [not] to ensure her ability to progress in her academic program").

50. Kevin Golembiewski, *Disparate Treatment and Lost Opportunity: Courts' Approach to Students with Mental Health Disabilities Under the IDEA*, 88 TEMP. L. REV. 473, 484 (2016).

51. *Id.* at 485–86.

52. 34 C.F.R. § 300.8(c)(4)(i) (2016) (emphasis added).

only guarantee eligible students the opportunity to receive meaningful *educational* benefit.⁵³ As a result, when a student with a disability is “struggling in areas deemed noneducational but is making educational progress, her school district has no obligation to provide her special education supports and services.”⁵⁴ And “in cases where [such a] student is already eligible for special education, the school district has no obligation to provide any additional supports and services.”⁵⁵

Despite this central role of “educational” in the IDEA, there is significant debate among federal courts as to the meaning of that term. Many courts construe “educational” as solely encompassing developmental domains that are academic in nature—that is, those courts equate “educational” with “academic.”⁵⁶ At the same time, other courts view “educational” more expansively, finding that academics and other developmental areas, such as behavior, socio-emotional intelligence, and independent living skills, are educational areas.⁵⁷

53. *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988).

54. *Golembiewski*, *supra* note 50, at 485.

55. *Id.*

56. *See, e.g., Mr. N.C. v. Bedford Cent. Sch. Dist.*, 300 F. App'x 11, 13 (2d Cir. 2008) (equating “educational performance” with a student’s academic performance); *R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 946 (9th Cir. 2007) (same); *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 67 (2d Cir. 2000) (same); *G.H. v. Great Valley Sch. Dist.*, No. 12-2735, 2013 WL 2156011, at *7 (E.D. Pa. May 20, 2013) (same); *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 662 (S.D.N.Y. 2011) (same); *C.T. v. Croton-Harmon Union Free Sch. Dist.*, 812 F. Supp. 2d 420, 433 (S.D.N.Y. 2011) (same); *Katherine S. v. Umbach*, No. CIV.A. oo-T-982-E, 2002 WL 226697, at *11 (M.D. Ala. Feb. 1, 2002) (same).

57. *See, e.g., Mr. I. ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 12 (1st Cir. 2007) (“[E]ducational performance . . . is more than just academics.”); *City of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1467 (9th Cir. 1996) (“[E]ducational benefit [under the IDEA] is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization.”); *Lauren P. ex rel. David & Annmarie P. v. Wissahickon Sch. Dist.*, 310 F. App'x 552, 554–55 (3d Cir. 2009) (concluding that the school district’s “failure to address [the student’s] behavioral problems in a systematic and consistent way denied [her] a FAPE”); *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 394 (3d Cir. 1996) (determining that the IDEA requires school district to address students’ behavioral and communication needs).

The majority and dissenting opinions in the Sixth Circuit's *Fry* decision illustrate this disagreement amongst courts. Based on the IDEA's broad remedial goal of ensuring that students with disabilities become self-sufficient adults, the *Fry* majority concluded that in-school services that are nonacademic but helpful for developing independent-living skills are educational services.⁵⁸ The court thus interpreted "educational" to extend beyond academics. In contrast, the dissent tied "educational" to academic programming, apparently because academics are the primary focus of schools.⁵⁹

Given the important role of "educational" in IDEA claims and the current malleability of that term, precedents that explore the meaning of "educational" can heavily influence the scope of the IDEA's protections. Courts create this type of precedent when they apply the injury-centered approach. *Fry* is again instructive.

The Sixth Circuit found that bonding with a service dog and achieving socio-emotional stability at school are educational endeavors.⁶⁰ This determination supports an expansive reading of "educational" that encompasses independent living skills, as well as socio-emotional development. Under that interpretation, a student who has a disability that prevents him from maintaining emotional stability would be eligible for IDEA services because his disability affects an educational area—his socio-emotional development. The student's school district would therefore have to provide him services designed to address his socio-emotional needs, such as in-school counseling or a behavior plan.⁶¹ Conversely, such a student would not be IDEA-eligible under Judge Daughtrey's "academic" interpretation of "educational," and the student's school district would have no obligation to provide him socio-emotional supports.

At this time, no court has relied on *Fry*'s "educational" analysis in considering the merits of a FAPE claim. However, it may just be a matter of time. Courts considering FAPE claims

58. *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 628 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016).

59. *Id.* at 633 (Daughtrey, J., dissenting).

60. *Id.* at 624.

61. *See Golembiewski, supra* note 50, at 483.

have repeatedly looked to decisions applying the injury-centered approach for guidance.⁶²

If the Supreme Court adopts and applies the injury-centered approach in *Fry*, its interpretation of “educational” could have a significant impact on FAPE claims moving forward. Beyond the broad influence the Court wields as a result of its institutional role, the Court has yet to opine on the meaning of “educational,” and the specific questions raised in *Fry* about that term are the subject of intense debate among parents and school districts. The Court has heard several IDEA cases in the past few decades, but those cases have not required it to explore what “educational” means under the IDEA. As such, that type of analysis in *Fry* could be particularly impactful among lower courts. Furthermore, the extent to which independent living and socio-emotional skills—as non-academic skills—constitute educational skills are contentious issues among parents and school districts,⁶³ and as noted above, *Fry* implicates questions about both types of skills. In light of these circumstances, the Supreme Court should carefully consider the implications of its decision if it chooses to apply the injury-centered approach in *Fry*.⁶⁴

Of course, even if the Supreme Court adopts the injury-centered approach in *Fry*, it does not have to *apply* the approach.

62. See, e.g., *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 650 (9th Cir. 2005) (citing *Charlie F.*—the Seventh Circuit exhaustion case establishing the injury-centered approach—when considering the merits of an IDEA claim); *S.S. by & through St. v. D.C.*, 68 F. Supp. 3d 1, 13 & n.4 (D.D.C. 2014) (same); *D.F. ex rel. L.M.P. v. Leon Cty. Sch. Bd.*, No. 4:13CV3-RH/CAS, 2014 WL 28798, at *4 (N.D. Fla. Jan. 2, 2014) (relying on an injury-centered, exhaustion case—*M.T.V. v. DeKalb Cty. Sch. Dist.*, 446 F.3d 1153 (11th Cir. 2006)—in determining that retaliation can provide a basis for a FAPE claim).

63. See *supra* notes 56–57 and accompanying text (discussing the split among courts attempting to define “educational”).

64. Importantly, in performing this analysis, the Court should be cognizant of the unique incentives faced by the parties. A broader interpretation of “educational” is beneficial to parents and students. Again, school districts are only required to provide supports and services necessary to *educational* progress. Thus, if “educational” is narrowly construed to exclude socio-emotional skills, then school districts need not assist students with socio-emotional development. However, when confronted with the injury-centered approach in the exhaustion context, parents, including the Frys, are incentivized to argue for a narrow reading of “educational.” Judge Daughtrey’s dissent underscores this point; her position on “educational” is favorable to the Frys but might harm parents outside the exhaustion context.

Remanding to the Sixth Circuit without applying the approach might be the most prudent course of action considering the current posture of the case. Although courts generally address affirmative defenses such as exhaustion at the summary judgment stage,⁶⁵ the district court dismissed the Frys' claims on the pleadings. Consequently, in determining whether E.F.'s injuries are educational in nature, the Sixth Circuit lacked the benefit of a developed record. The Sixth Circuit was forced to rely solely on the allegations in the Frys' complaint, and under the Federal Rules of Civil Procedure, the Frys were only required to allege plausible claims; their complaint did not need to provide detailed factual allegations about E.F.'s injuries. Indeed, the Frys may need discovery to determine the actual scope of E.F.'s injuries. The Frys do not attend school with E.F. and are therefore limited in their ability to access information about E.F.'s in-school experiences.

Without the benefit of a developed record, the Sixth Circuit was forced to resort to assumptions and inferences about E.F.'s alleged injuries when it considered whether those injuries are educational in nature. In describing the Frys' allegations and E.F.'s injuries, the Sixth Circuit stated:

The Frys allege *in effect* that E.F.'s . . . school denied her a free appropriate public education. In particular, they allege . . . *implicitly* that Wonder's absence hurt her sense of independence and social confidence at school. . . . One might also infer, though the Frys do not allege it directly, that [Napoleon's actions] inhibit[ed] E.F.'s sense of confidence and independence, as well as her ability to overcome social barriers, *in school*.⁶⁶

Thus, as the dissent recognized, the majority's conclusions about E.F.'s injuries "w[ere] based on . . . speculation, because the Frys' complaint was dismissed on the pleadings before any discovery could occur."⁶⁷ Rather than attempting to infer the exact injuries

65. See *Jones v. Bock*, 549 U.S. 199, 214–15 (2007) (explaining and discussing the exhaustion requirement); see also *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 867 (9th Cir. 2011) (en banc) ("[T]he IDEA's exhaustion requirement is a claims processing provision that IDEA defendants may offer as an affirmative defense.").

66. *Fry v. Napoleon Cmty. Sch.* 788 F.3d 622, 627–28 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016) (emphases added).

67. *Id.* at 633 (Daughtrey, J., dissenting).

at issue and then delving into the “educational” debate, the Supreme Court may consider remanding with instructions to allow the parties to conduct discovery.

V. Conclusion

The Supreme Court’s decision in *Fry* will clarify the proper scope of the IDEA’s exhaustion requirement, thus resolving an important circuit split. Should the Court resolve that split by adopting the injury-centered approach, its decision may also bear on a deep split among courts about the meaning of “educational.” But despite the importance of this issue, it is not squarely before the Court; it lurks in the shadows of *Fry*. The Court should proceed cautiously.